United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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74-2066

To be argued by
ETHAN A. LEVIN-EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2066

UNITED STATES OF AMERICA,

Appellee,

—against—

CHARLES MESSINA,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Charles Messina, appeals from a judgment entered August 2, 1974, in the United States District Court for the Eastern District of New York (Weinstein, *J.*), convicting him, in Count One of the indictment, of stealing, on November 25, 1973, approximately forty-four cartons of Italian sweaters from Cargo Building 80 at John F. Kennedy International Airport, which sweaters had a value of approximately $45,000 and which sweaters were goods traveling in foreign freight, in violation of Title 18 U.S.C. §659. On Count Two, the remaining count in the indictment, Messina was convicted of possessing those sweaters unlawfully in violation of Title 18 U.S.C. § 659.

Appellant was indicted on March 28, 1974. On April 22, 1974, a hearing was held on appellant's motion to suppress the anticipated in court identifications of three wit-

nesses. Appellant's motion to suppress was denied. Following the denial of appellant's pre-trial motion a jury trial was held, ending on April 26 with a verdict of guilty as charged on both Counts. On August 2, 1974 Judge Weinstein sentenced appellant to four years imprisonment on each count, each to run concurrent with the other. Appellant is free on bail pending this appeal.

On appeal, the only issues raised are whether Judge Weinstein erred in denying appellant's motion to suppress the in court identification of him by the witnesses Schmeltz, Bavaro and Mantione, and in admitting into evidence two sweaters which had been surrendered by the appellant to FBI Agents.

Statement of the Case

A. Trial Testimony

At trial it was proven that on November 25, 1973 a shipment of forty-four cartons of Italian knit turtleneck sweaters, traveling from Milan, Italy to New York City, were stolen (T. 100-123, T. 270-277).* When stolen, the sweaters were contained in cartons that had been loaded into a truck belonging to the Lance Airfreight company. The truck had been parked adjacent to Cargo Building 80 at John F. Kennedy International Airport, pending delivery on November 26, 1973 to the consignee, "Sue B Fashions" (T. 112-117). On November 26, 1973, Henry Wilkins, an owner of Lance Airfreight noticed that the entire truck was missing (T. 273).

Robert Bavaro, an employee of Bob's Towing Service, testified that on the afternoon of November 25, 1973, the appellant came to Bob's Towing to pay for the towing of a

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* Page references in parenthesis refer to both the hearing and the trial minutes.

truck from Cargo Building 80 at John F. Kennedy International Airport (T. 143-146). Bavaro testified that he had received a call, earlier in the day, from a man who arranged for the job, and that, later on that day, appellant came in and paid for the work with a one-hundred dollar bill. When appellant came into the towing establishment he met Bavaro and had a conversation confirming that he had called earlier and that the truck to be towed was loaded with "nuts and bolts". They confirmed the fee to be charged and Bavaro referred him to another employee, Robert Schmeltz, to prepare the necessary documents and pay the charges (T. 144-146).

Robert Schmeltz testified that on November 25, 1973 he was working at Bob's Towing Service when the appellant came in to pay for the towing of the Lance Airfreight truck from Cargo Building 80 (T. 187-194). He stated that the appellant came in and assisted in the preparation of an "authorization to tow". Appellant then signed the authorization and paid for the job with a one-hundred dollar bill. Moreover, appellant produced various documents bearing the name "Lance Airfreight" and identified himself as a mechanic for that company (T. 191-192).

Kenneth Mantione, a driver for Bob's Towing at the time, testified that on November 25, 1973 at about 9:00 P.M. he delivered the Lance Airfreight truck in question to the appellant at an American Gasoline station in Brooklyn. Previously, he had picked up the truck at Cargo Building 80, John F. Kennedy International Airport, and towed it, pursuant to his dispatcher's instructions, to Washington Avenue in Brooklyn. He arrived at approximately 9:00 P.M. and met the appellant who told him where to place the truck and actually assisted in positioning the vehicle (T. 220-222). Throughout the entire encounter the area was well lighted (T. 221).

When subjected to cross-examination these three witnesses testified that they had each selected appellant's photograph from a spread of pictures shown to each of them by agents of the F.B.I. (T. 174-175, 206-207, 236). They also testified that they had picked the appellant out of a lineup (T. 175-177, 236-245).

Detective Dominick Maiolo testified that on December 18, 1973, following appellant's arrest and arraignment, the appellant voluntarily surrendered to him two turtleneck sweaters bearing a distinctive number on the label which coincided with the numbers on the sweaters in the stolen shipment (T. 359-360). Maiolo identified those sweaters in court (T. 359), and they were later received in evidence as Government Exhibits 4a and 4b (T. 391).

Mr. Bernard Ruderman testified that he was the sales manager for "Sue B Fashions", the consignee of the stolen shipment (T. 386). He stated that he was familiar with all the shipments consigned to his company, including the hijacked load, and that his duties required him to be familiar with all the characteristics of "Sue B's" garment. He identified the sweaters as having been manufactured for his firm and further stated that the two sweaters surrendered by appellant were exactly like those stolen in every respect (T. 380-390). On cross-examination Mr. Ruderman testified that he based his certainty upon such unique characteristics as weaving, wool content, design, labeling, color and style (T. 392-399). He further elaborated that, pursuant to a request by the Assistant United States Attorney, he had reviewed the records of "Sue B" and thereby accounted for virtually every similar sweater that had not been stolen. His conclusion that the two surrendered sweaters were congruent to those stolen was, in part, the result of an exact process of elimination of virtually any other possibility (T. 392-413).

B. Suppression Hearings

1. Identification

At a pre-trial hearing on appellant's motion to suppress the identifications made by Bavaro, Schmeltz and Mantione, the three witnesses testified substantially as they did at trial.

Schmeltz testified that on February 27, 1974 he viewed a lineup and identified a photograph taken of that lineup (T. 6). He stated that he had selected the person holding card No. 3 in the lineup (the appellant), as the man who had come into his employer's place of business, Bob's Towing Service, to pay for the towing of a particular truck (T. 8). He testified that on the Sunday in question he was in the office of Bob's Towing Service with the dispatcher, Robert Bavaro, watching television, when appellant came in and confirmed the towing of the truck (T. 9-13). He stated that, thereafter, when he learned that the truck had been stolen, he was asked by agents of the Federal Bureau of Investigation and detectives of the Port Authority Police to view some mug shots which he did, after giving them a description of the man (T. 14-20). He picked out four or five photographs that might have been the man, and then tried to assist a Port Authority artist in reconstructing a composite drawing of the man (T. 21). Ultimately Schmeltz was shown a spread of seven photographs by the F.B.I., out of which he selected the one photograph of the appellant (T. 24-26; 32-33), as the person he saw in Bob's Towing Service (T. 37). After counsel had completed direct and cross-examination of the witness, Judge Weinstein questioned him and clarified that the defendant was recognized, by him, as the man in Bob's Towing Service, not only from the photographic spread and the lineup, but also, from an independent recollection of appellant (T. 40-41).

Kenneth Mantione was only permitted to be cross-examined at the hearing, but notwithstanding this he testified that when he viewed the lineup he selected the appellant as the man who had taken delivery of the hijacked truck from him on the night it was towed (T. 50-58). He said that shortly after the night of the theft he was asked to look through mug books and assist in the creation of a composite drawing but that this was not very helpful until he was able to pick appellant out of a photographic spread (T. 59-68). Mantione testified that in February, 1974 he selected appella t in an F.B.I. lineup as the person to whom he delivered the hijacked truck (T. 68-79). In response to defense counsel's specific question, Mantione explicitly stated that he made the lineup identification based upon his recollection of the events, not from the photographic spread (T. 73-75).

Finally defense counsel was permitted to cross-examine Robert Bavaro. He testified that he picked appellant out of the February, 1974, F.B.I. lineup as the man who had come into Bob's Towing Service to arrange the towing of the hijacked truck (T. 77-82). He too testified that he had previously picked appellant out of a photographic spread (T. 83-84), but he also stated that his in-court identification of appellant as the man that he saw in Bob's Towing Service was based upon his memory of that day, not the photographs or the lineup (T. 87). Following the hearing Judge Weinstein denied the motion to suppress the identification (T. 88).

2. Voir Dire on the sweaters

During the course of the trial, as agreed earlier (T. 88), a *voir dire* was held on the admissibility of the two sweaters offered by the Government. In summary, the evidence heard by the Court on this *voir dire* was as follows:

On December 18, 1973 the appellant was arrested at his home, pursuant to a warrant, by Special Agent Francis R. Jules of the F.B.I. (T. 295). He was advised of his rights, processed and brought before the United States Magistrate for arraignment. While awaiting arraignment (and after having executed a Waiver of Rights Form [T. 296]) appellant denied his involvement in the hijacking, but stated that he wished to cooperate with the authorities, and that he had some sweaters at his house (T. 298). He offered to surrender these sweaters to the F.B.I., and asked them if they would drive him home after the arraignment (T. 300).

After this conversation appellant was presented before the Magistrate for arraignment, at which time Edward Kelly, Esq., of the Federal Defenders Unit of the Legal Aid Society, was appointed to represent him (T. 299; 313). Mr. Kelly spoke with appellant privately before the arraignment, and appellant was then arraigned and released on a personal recognizance bond. On the way out of the Federal Courthouse appellant, the Agents and Port Authority Detectives who had agreed to drive appellant home, passed Mr. Kelly and Agent Jules told him not to worry, that he would drive his client home (T. 301). Mr. Kelly did not object (T. 315-316). Nor did Mr. Messina ever indicate a desire other than to be taken home by the law enforcement officials (T. 315-316).

When they arrived at appellant's residence, appellant and Detective Maiolo went upstairs. Appellant then offered Maiolo a drink and had his wife go and bring the sweaters which were then given to Maiolo (T. 321-322).

After hearing this testimony, and evidence from Simon Chrein, Esq., the supervising attorney of the Federal Defenders Unit, Judge Weinstein made a finding that the surrender of the sweaters was consensual, voluntary and uncoerced; that he credited the testimony of Special Agent

Jules "completely" and that when appellant consented to speak with the agents and give them the sweaters it was with the full benefit of having been advised by his attorney that he had no obligation to do so and that it was probably not in his best interest to do so—advice which he deliberately ignored. The Court admitted the sweaters subject to a proper foundation being laid as to their relevancy (T. 325-331).

Bernard Ruderman, testified that the two sweaters were recognizable as being made exclusively for his firm. He stated that he had reviewed their business records and based upon that review, minute differences in design and quality, and his knowledge of the trade, it was his opinion that the two sweaters surrendered by Charles Messina came from the stolen load. When asked to express the degree of his certainty he said "Oh, about 95% sure", which he then explained in detail (T. 333-340). After the hearing Judge Weinstein ruled the sweaters admissible but warned against Mr. Ruderman characterizing the percentage likelihood of them being part of the same load (T. 348). When the sweaters were admitted into evidence Judge Weinstein gave a limiting instruction to the jury (T. 391).

ARGUMENT

POINT I

The courtroom identifications of appellant by Schmeltz, Bavaro and Mantione were properly admitted.

Appellant contends that the in-court identification of him by the witnesses Schmeltz, Bavaro and Mantione should have been suppressed. He argues that none of these witnesses had a sufficient opportunity to observe him and that the pre-trial identifications procedures were impermissibly suggestive. Therefore, he urges, there was a substantial likelihood of misidentification. Appellant's contention is without merit.

In *Simmons* v. *United States*, 390 U.S. 377 (1968), the Supreme Court recognized that the investigatory procedure of using photographs to identify criminals:

> ". . . has been used widely and effectively in criminal law enforcement, from the stand-point both of apprehending offenders and of sparing innnocent suspects the ignominy of arrest by allowing eye-witnesses to exonerate them through scrutiny of photographs" (at 384).

The Court announced that it was ". . . unwilling to prohibit its employment, either in the exercise of [its] supervisory power or, still less, as a matter of constitutional requirement." *Supra.* Instead, the Court ruled that a case by case determination had to be made to examine whether a pre-trial photo identification was "so impermissably suggestive as to give rise to a very substantial likelihood of irreparable misidentification". *Supra.*

Regarding a pre-trial identification accomplished with a line-up the Supreme Court has held that the identification

will not taint a subsequent in-court identification unless it "was so unnecessarily suggestive and conducive to irreparable mistaken identification" so as to deny appellant due process of law. *Stovall* v. *Denno,* 388 U.S. 293, 301-302 (1967).

The "primary evil to be avoided", then, is any procedure which fosters "a very substantial likelihood of irreparable misidentification". *Neil* v. *Biggers,* 409 U.S. 188, 198 (1972). Thus, one of the grounds upon which the exclusion of an in-court identification must be founded is that it is totally reliant upon an impermissibly suggestive pre-trial procedure. *See e.g., Foster* v. *California,* 394 U.S. 440 (1969). However, even though there may be a highly suggestive pre-trial identification in the case, this does not necessarily preclude the witness from identifying the defendant in the courtroom. *See, United States* v. *Fernandez,* 456 F.2d 638 (2d Cir. 1972). If the witness can testify that his in-court identification is based on a recollection of the actual event and not on the objectionable photographic spread or lineup, his testimony will be admitted on that basis. *Coleman* v. *Alabama,* 399 U.S. 1 (1970); *Haberstroh* v. *Montanye,* 493 F.2d 483, 484 (2d Cir. 1974). In order to satisfy the requirement that the identification be made from a recollection of the actual event, courts have sought evidence that the witness had the opportunity to view the defendant at the time, and that the "totality of the circumstances" support the conclusion that misidentification was not a "substantial likelihood". *Neil* v. *Biggers, supra,* at 199.

Appellant apparently does not contend that either the photographic spread or the lineup was intrinsically suggestive, but rather that the events which preceded them were. His argument consists of an averment that the attempts to narrow the description of the offender to a workable one were so highly manipulative so as to taint any subsequent attempts at identification.

Robert Schmeltz testified that, a few days after the theft, he went to the Port Authority Police headquarters to look through some photographs in an attempt to find the man he saw in Bob's Towing Service on the day in question. Alone, he went through some albums and found about four or five photos of people that he thought resembled the man for whom he was looking (T. 18). Afterwards, he attempted to assist in the drawing of an artist's rendering of the man (T. 21). He was unsuccessful although he thought the one done with Kenneth Mantione's assistance looked "something like" him (T. 23). He was not shown the photographic spread until several days later when he selected appellant's picture (T. 25). He testified that he told the agents that that picture "looked like the guy" (T. 26). He also testified that he picked the same man out of a lineup (T. 38).

Kenneth Mantione was cross-examined at the pre-trial hearing and testified that he too picked appellant out of a lineup (T. 51), as the man he saw at the gas station on November 25, 1973. He too acknowledged that, prior to that time, he'd assisted in the rendering of a composite drawing, which he thought "looked quite a bit like the gentleman" (T. 59). He had tried to pick out a "mug shot" of the man he saw but was unable to do so (T. 60). A few days later he selected appellant's photograph from the spread (T. 63). During the course of his testimony at trial Mantione identified a photograph of the lineup out of which he selected appellant and the photo was shown to the jury (T. 245).

Bavaro testified that he too selected appellant in the lineup (T. 77) and that prior to that he had assisted in making a composite drawing (T. 82). He too selected appellant's photograph from the spread (T. 84). During cross-examination, at the trial, he gave substantially the same testimony before the jury (T. 173-177).

In short, the jury was fully aware of everything that preceded the in-court identifications of these witnesses.

There was nothing suggestive, at all, about any of the efforts made to identify the appellant. The witnesses could not be "suggested" to subjectively describe a particular person. The record reflects that there were variances between the composites that were made. When all three witnesses, independently of one another, identified the photograph of the appellant from the spread they did it from their memories of seeing him. The same was true of the lineup. The same was true in the courtroom (T. 40-41; 75; 87).

Assuming, *arguendo,* that the in-court identifications were based totally on the witnesses' recollection of the photo spread and the lineup, there is still nothing improper about that, so long as there was nothing impermissable done at the showing of the spread or at the lineup.

Although it cannot be said that Schmeltz and Bavaro had a great deal of time to initially observe appellant, the time they had was adequate. In *Coleman* v. *Alabama,* 399 U.S. 1 (1970), an in-court identification was upheld even though the witness' opportunity to view the defendant was relatively short, and subsequent attempts at identification failed. The in-court identification was admitted because it was:

> ". . . entirely based upon observations at the time of the [event] and not all induced by the conduct of the lineup". at 5-6.

In *Coleman,* the Court was confronted with a factual situation qualitatively similar to the one here. There, an eyewitness testified that he had only a brief opportunity to observe the defendant's face as it was illuminated by the headlights of his car.

Clearly, Schmeltz and Bavaro had at least as much opportunity to observe as did the witness in *Coleman*. Mantione's identification is even more easily justified. He was with appellant for a considerable period of time. They met face to face, maneuvered the truck and discussed where it should be placed. The area was well lighted and appellant's face was uncovered. The very colloquy reprinted it appellant's Brief (at p. 26-27) is a perfect example of the certainty with which Mantione made his identification:

> "A. As far as my recollection, this looks like the gentleman I met at the station. He's not my father. I don't see him every day. What am I supposed to tell you?" (T. 74).

The very usage of hyperbole ("If this man was going to the gas chamber, I would say I wasn't positive. What am I supposed to tell you?") indicates not a lack of confidence in the identification, but rather exasperation at a feeling that he could not convince defense counsel that he was as sure as he was.

The procedures employed prior to the use of the photographic spread and lineup were proper, indeed they were the only techniques that could have been used.

It is undisputed that both the lineup and the photographic spread comported with the requirements of *United States* v. *Wade*, 388 U.S. 218 (1967) and *Simmons* v. *United States*, 390 U.S. 377 (1968). In all events the record is clear that all three witnesses made their in-court identification based upon independent recollections of the appellant. Therefore, appellant's contention is totally without merit and does not require reversal.

POINT II

The finding of the District Court that the sweaters were consensually surrendered by appellant, despite the advice of counsel, should stand.

Appellant's argument that his surrender of the two sweaters to the authorities was coerced and accomplished in derogation of his right to the effective assistance of counsel is frivolous.

(1) Consent Search

"Consent searches are part of the standard investigatory techniques of law enforcement agencies". *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 231-232 (1973).

When asserting that a search was made upon the consent of the defendant the prosecution must bear the burden of proving that the consent was freely and voluntarily given. *Bumper* v. *North Carolina,* 391 U.S. 543 (1968). However, in evaluating whether or not the prosecution has satisfied that burden the Courts look to the "totality of the circumstances". *United States* v. *Faruolo,* — F.2d — (2d Cir. Slip opinions, p. 5825; decided October 29, 1974); *United States* v. *Kohn,* 495 F.2d 763 (2d Cir. 1974) (Per curiam); *United States* v. *Mapp,* 476 F.2d 67 at 78 (2d Cir. 1973). If, after such an examination, the prosecution has shown that the defendant's decision to allow the search was his own, knowingly made, and not one imposed on him through coercion or deceit, then the Courts have found consent and admitted property so obtained in evidence. *Schneckloth* v. *Bustamonte,* 412 U.S. 218 (1973).

Before allowing the Government to offer the two sweaters obtained from the appellant, Judge Weinstein ordered that a full hearing be had to clarify just what had

transpired (T. 294). During the course of the testimony it was brought out that on December 18, 1973, pursuant to a warrant, the appellant was arrested at his residence (T. 295). Special Agent Francis R. Jules of the F.B.I. advised him immediately of the charges against him and of his *Miranda* rights. He was then transported to the New York office of the F.B.I. where he executed a written waiver of those rights (T. 296). Later that day, at the Office of the United States Attorney for the Eastern District of New York, while awaiting arraignment before the Magistrate, appellant informed Agent Jules that he had some sweaters that he was willing to surrender (T. 298). He was then brought before the Magistrate, where Mr. Edward Kelly of the Legal Aid Society was appointed to represent him. After the arraignment he was released on a personal recognizance bond (T. 299-300). Appellant and his lawyer spoke privately before the arraignment and Mr. Kelly testified (after his client waived the attorney-client privilege) that it was his practice to advise clients not to make any statements to law enforcement officers without first consulting with counsel (T. 317). Mr. Kelly further testified that he knew Agent Jules, and recognized him as the F.B.I. Agent whose name appeared as the affiant in the complaint filed against appellant (T. 315-316).

After the arraignment the agents and the Port Authority detectives agreed to drive appellant to his home, pursuant to his request and his statement that he wasn't feeling well (T. 301). As they were leaving, they passed Mr. Kelly who was informed of their intentions and made no objection; neither did his client (T. 301).

When they arrived at appellant's home only Detective Maiolo accompanied him inside and waited the short time necessary for the appellant's wife to go and get the sweaters which he then turned over to Maiolo (T. 321). While they were waiting the appellant offered the Detective a drink of whiskey. Maiolo then left and delivered the

sweaters to Jules, in the car (T. 370). These were the facts adduced at the *voir dire* on the sweaters. It is respectfully submitted that no clearer illustration of knowledgable consent could ever be shown.

In this case, the appellant had been arrested, but he was free on his personal recognizance. He had not only been advised of his rights orally and in writing, but he had actually consulted with his attorney. In fact he had an opportunity before he left with the agents to consult with his lawyer again. The record indicates that his lawyer, as was his practice, probably told him not to have any further contact with the agents, but he apparently refused to follow that advice.

The actual circumstances of the surrender are replete with facts consistent with voluntary consent. First, it was appellant's idea to be driven home. Second, he is the one that first told the agents he had the sweaters. Third, only one officer went upstairs with him, *compare, United States* v. *Mapp, supra* at 70. Fourth, no search was made. Indeed, appellant waited with Detective Maiolo for the few minutes it took for his wife to bring the sweaters, at his request. Fifth, appellant hardly can be said to have been behaving as a man coerced when he offered his alleged antagonist a drink.

Perhaps the best characterization of these events was made by Judge Weinstein when in, addressing counsel, he made his finding following the *voir dire*:

> ". . . I find as a matter of fact that the defendant was fully apprised of his rights on a number of occasions before arraignment, that he was fully advised of his rights by Mr. Kelly, that Mr. Kelly specifically warned him not to discuss any matters with any of the law enforcement officials, that Mr. Kelly did see a person known to him as an FBI

Agent about to take the defendant to his home, and Mr. Kelly was aware that the defendant would be taken to his home by an FBI Agent, that defendant was fully aware that he should not be talking to any FBI Agent, or Police person, and that he should not allow them to come into his house without first clearing it with counsel, that he ignored the advice of his counsel, and voluntarily waived his rights not to talk, not to permit Police personnel and investigatory personnel to enter his house. He did this very deliberately, because he thought that he would be able to place himself in a better position in the prosecution of his case, and that he might be able to gain the sympathy and the protection of the FBI Agents and the Police personnel.

There was nothing, however, done by any of the prosecution forces to induce him to make that statement, or to instill that state of mind.

The FBI acted with full propriety here, particularly since the FBI Agent informed counsel for the defendant what he was going to do.

* * * * *

This was not a planned matter. It arose purely because of the request and attitude of the defendant.

* * * * *

The defendant asked them to drive him home, and counsel for the defendant specifically approved it, and they were doing a humanitarian service here.

* * * * *

I credit completely the FBI Agent, Mr. Jules. I believe that what he said happened, did happen, and Mr. Kelly does not have any recollection.

* * * * *

> Mr. Kelly is normally a very good lawyer, but I say he either was sloppy in this case, or else the client is uncontrollable. Based on what I saw in the courtroom, it is based on that client is uncontrollable. It is not Mr. Kelly's fault. You and Mr. Chrein could not even control this client in open court with a Reporter present. I do not see how Mr. Kelly is to be blamed if he couldn't control the man" (Tr. 325-328).

A clear case of knowing consent given with (albeit, despite) the effective assistance of counsel would be difficult to imagine.

(2) Effective Assistance of Counsel

In *Massiah* v. *United States,* 377 U.S. 201 (1964) the Supreme Court held that incriminating statements secretly and deliberately elicited from a defendant by federal agents, in the absence of his attorney and after indictment could not be admitted against the appellant. Appellant, here, relies heavily on this decision in his contention that his Sixth Amendment rights were derogated when he surrendered the two sweaters to the police after his arraignment. The facts before this Court are distinguishable from those in *Massiah* on a number of counts.

A statement will be suppressed, under the rule announced in *Massiah,* only when the law enforcement agents have "deliberately elicited" incriminating statements from a defendant by direct interrogation or by surreptitious means. The rule does not apply to spontaneous or voluntary statements made by the defendant in the presence of government agents. *United States* v. *Gaynor,* 472 F.2d 899, 890 (2d Cir. 1973).

In *United States* v. *Barone*, 467 F.2d 247 (2d Cir. 1972), defendant was arrested at his home by agents of the F.B.I. He was advised of his rights orally and he signed a form acknowledging and waiving them. He then telephoned his attorney and bondsman. Thereafter, he spoke with the agents and admitted that he was a bookmaker. He too, alleged that *Massiah* v. *United States* barred the use of that statement. This Court held that *Massiah* was inapplicable. *Supra*, at 249. The rationale of the Court was as follows:

> "Here there was not only no deception but an express waiver of counsel signed by Barone * * *, and a telephone conversation between Barone and his attorney." at 249.

A defendant who has been advised of his rights, acknowledged them, conferred with counsel and then, deliberately continues to affirmatively maintain contact with law enforcement officials, cannot now claim that the fruits of that contact were garnered of the Sixth Amendment. *See, United States* v. *Cohen*, 358 F. Supp. 112, 126-127 (S.D. N.Y. 1973).

Appellant was advised of his rights orally and in writing. He acknowledged and waived them in writing. He was arraigned with counsel present. He conferred with counsel and there was testimony that his lawyer probably advised him not to have any further contact with the agents. Appellant, despite this advice and in direct disregard for it, rode home with the agents and voluntarily surrendered the sweaters. The record is full of indications that no deceit of trickery was used. The agents told appellant's attorney what he had asked them to do. Mr. Kelly didn't object. Appellant was present when the agents told his lawyer they were driving home and he voiced no objection either. Indeed, judging from the fact that he served Maiolo a drink when they got to his home, it is not difficult to understand why Judge Weinstein found that:

> ". . . [appellant] did this very deliberately, because he thought that he would be able to place himself in a better position in the prosecution of his case, and that he might be able to gain the sympathy and the protection of the FBI Agents and Police personnel" (T. 326).

From all the circumstances surrounding the production and surrender of the two sweaters, it is fairly obvious that appellant *wanted* to turn them over. In no way was he tricked or deceived.

Acknowledging, that for any waiver to be effective it must be done knowingly and knowledgeably, the Government rsepectfully submits that there could be no better example than the one presented by this case. Appellant knew his rights. In fact, he had availed himself of the one he now complains was kept from him. He deliberately and methodically disregarded his attorney's instructions. A more perfect waiver would be difficult to imagine.

In light of the overall circumstances surrounding the obtaining of the sweaters, it is respectfully urged that Judge Weinstein acted properly in admitting them in evidence.

POINT III

A proper foundation having been laid, the evidence of the identifications and the sweaters was properly before the jury.

Contending that this Court take an "overall view" of the Government's evidence, although not urging that it was insufficient, appellant seemingly contends that a reversal is required because the identification evidence as well as the sweaters, (which according to appellant were of questionable origin), "must have had an enormous impact upon the minds of the jurors."

The United States is, frankly, at a loss in understanding appellant's contention. Certainly, based upon the witness Ruderman's testimony, there was adequate foundation for the admissibility of the two sweaters. In addition, Judge Weinstein placed their use by the jury in proper perspective. Thus, when they were admitted in evidence, he stated:

> ". . . You understand, ladies and gentlemen, the fact that I am allowing these exhibits to come in does not indicate that I believe that they were a part of the shipment or they weren't a part of the shipment or that they were found in defendant's house or that they were not.
>
> That is for you to decide. All I am ruling is that you may consider the evidence. Is that clear?" (T. 391).

Moreover, following their admission, defense counsel left no stone unturned in making absolutely sure the jury knew that the sweaters were only circumstantial evidence (T. 392-396, 408-413). In fact, during the Government's re-direct of the witness he was asked the following question:

> Q. Can you tell us how sure you are that these sweaters as you have testified before came from the hijacked load? (T. 407).

Defense counsel's objection was sustained and the Court immediately gave the following curative charge:

> "Ladies and Gentlemen, you will have to decide that yourself based upon the circumstances you have heard" (T. 407-408).

Admittedly, the sweaters here, were circumstantial evidence, no direct evidence having been adduced to show that they were actually from the stolen load.

However, the circumstances described which preceded their admission undoubtedly was more than enough to substantiate their presence in the case.

They were exactly the same as the stolen sweaters in every conceivable respect. Although the Court, properly, would not permit Mr. Ruderman to characterize the likelihood that they were from the stolen shipment, defense counsel's assiduous cross-examination of the witness gave the jurors every opportunity to decide that for themselves (T. 392-396, 408-413).

It is well-settled that circumstantial evidence may be weighed by the jury in the same way as direct evidence. *Holland* v. *United States,* 348 U.S. 221 (1954). It is just as clear that, to be admitted, circumstantial evidence need not exclude all other reasonable hypotheses other than guilt and is to be given whatever probative force it deserves. *United States* v. *Siragusa,* 450 F.2d 596 (2d Cir. 1971); *United States* v. *Grunberger,* 431 F.2d 1066 (2d Cir. 1970); *United States* v. *Ragland,* 375 F.2d 477 (2d Cir. 1967), *cert. denied* 390 U.S. 925; *United States* v. *Botsch,* 364 F.2d 550 (2d Cir. 1966); *United States* v. *Woodner,* 317 F.2d 649 (2d Cir. 1963), *cert. denied,* 375 U.S. 903; *United States* v. *Tutino,* 269 F.2d 488 (2d Cir. 1959); *United States* v. *Moia,* 251 F.2d 255 (2d Cir. 1958); *United States* v. *Brown,* 236 F.2d 403 (2d Cir. 1956).

It is self-evident that both the identifications and the sweaters had "an enormous impact upon the minds of the jurors". However, that was entirely proper under the circumstances. The evidence was admissible and it was probative. The jury was correctly instructed to give it whatever weight they felt it deserved, and it must be presumed that they followed the Court's instructions.

There was no reversible error in admitting this evidence. Indeed, there was no error at all.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: November 4, 1974

Respectfully submitted,

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AFFIDAVIT OF MAILING

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COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 6th day of November 1974 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Steven J. Hyman, Esq.
Kunstler Kunstler Hyman & Goldberg
370 Lexington Avenue
New York, N. Y. 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
6th day of November 1974

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501986
Qualified in Kings County
Commission Expires March 30, 1975